91-1401

NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1991

BONNIE BOUCHARD; RODNEY WACKER, VICKI DANOWICZ; GARY SEXTON; JACK D. YATES, JR.; LAWRENCE E. YATES; ILA FETT; ROSEMARIE STEEL; DANIEL J. ROSEY; PHYLLIS HENSLEY; KEVIN CARLSON; JEAN PETERS; TAMMY SUE EMPFIELD; LEO F. PROKOP, JR.; DORIS JEAN MEYER;AND PATRICK K. BOUCHARD,
PETITIONERS,

V.

THE REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES AND REGION V MENTAL RETARDATION SERVICES,
RESPONDENTS.

KEVIN HUSS; CHRIS AMUNDSON; AND JERRY JUNKER,
PETITIONERS,

V.

THE REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES AND REGION V MENTAL RETARDATION SERVICES,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

I. THE COURT OF APPEALS IMPROPERLY DISREGARDED THE FACTUAL FINDINGS UPON WHICH THE DISTRICT COURT BASED ITS CONCLUSION THAT THE DEFENDANT / APPELLANT VIOLATED THE FLSA AND FAILED TO PROVE GOOD FAITH AS REQUIRED BY 29 U.S.C. SECTION 259 WITHOUT FIRST DETERMINING THAT SUCH FACTUAL FINDINGS WERE CLEARLY ERRONEOUS OR THAT FED. R. CIV. PRO. 52(A) WAS OTHERWISE INAPPLICABLE.

II. THE COURT OF APPEALS ERRED IN MAKING FINDINGS OF FACT WHICH IGNORED A JOINT STIPULATION OF THE PARTIES THAT, IN ORDER TO AVOID CUMULATIVE TESTIMONY, THAT THE TESTIMONY OF ALL PLAINTIFFS TESTIFYING AT TRIAL WOULD BE TAKEN TO REPRESENT THE WORKING CONDITIONS OF ALL PLAINTIFFS EMPLOYED BY THE DEFENDANT.

III. THE COURT OF APPEALS ERRED IN FINDING THAT REASONABLE CONFORMITY WITH WAGE AND HOUR OPINION LETTERS SATISFIES THE REQUIREMENTS OF 29 U.S.C. §259 AND SUCH DECISION CONFLICTS WITH THE ACTUAL CONFORMITY STANDARD ADHERED TO BY OTHER CIRCUITS

IV. THE FINDINGS OF THE APPELLATE COURT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD

OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska is set forth in the Appendix.

The opinion of the United States Court of Appeals for the Eighth Circuit is set forth in the Appendix as is the Court's order of October 16, 1991 denying Rehearing and Rehearing En Banc.

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 25, 1991. An order denying a rehearing en banc was entered on October 16, 1991. On January 4, 1992 the Supreme Court of the United States entered an order with regard to Application No.91-A476 granting Petitioners until February 28,1992 to file a Petition for Writ of Certiorari. Petitioners believe this court has jurisdiction pursuant to 28 U.S.C. §1254 and Rule 10 of the Rules of the Supreme Court of the United States.

STATUTES AND REGULATIONS

29 U.S.C. Section §259(a)

In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938,. . .if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, or practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 C.F.R.§785.14

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to

be engaged."(Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (C.A. 8, 1948)

29 C.F.R. Section 785.20

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

29 C.F.R.Section 785.21 Less than 24 hour duty.

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. 'She is required to be on duty and the time is worktime.

29 C.F.R. Section 785.22

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked,

provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night;st sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (Citations omitted.)

29 C.F.R. Section 785.23 Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (Citations omitted.)

STATEMENT OF THE CASE

Respondent Regional Governing Board of Region V Mental Retardation Services and Region V Mental Retardation Services (hereinafter known as Region V) is a political subdivision of the State of Nebraska established under Neb. Rev. Stat. Section 83-141, et. seq. (Reissue 1987). Region V operates group homes for mentally retarded individuals in a sixteen county area in southeastern Nebraska. Region V provides vocational services (teaching of vocational skills) and residential services. The residential services consist of providing group homes for mentally retarded clients which are supervised by employees of Region V. Petitioners/Plaintiffs are twenty individuals who were employed by Region V to supervise mentally retarded clients in group homes in Fairbury, Nebraska. Their job title was Life Skills Trainer. The Plaintiffs fall into three general categories of Life Skills Trainers: weekday, weekend and substitute.

Prior to Garcia v. Metro Transit Authority, 469 U.S. 528 (1985) these community residences had been staffed by people paid on a salary basis. Hours worked were not recorded.

Plaintiffs brought this action under the FLSA alleging that they were entitled to be compensated for all "sleep time" spent on the premises of Region V from April 15, 1986 to November 17,1989.

Weekday LSTs were paid for eight hours in a workday and were actually on the Region V premises, for Region V's benefit, for a total of sixteen to seventeen hours. Weekend LSTs typically were on Region V premises from Friday afternoon to Monday morning. Weekday LSTs typically spent four nights a week on Region V premises, Weekend LSTs spent three. Weekend and Weekday LSTs were treated similarly in that they were allotted a specific amount of time each night for sleeping purposes during which they were required to remain on the employer's premises and for which they were not paid. During those sleeptime hours all LSTs were required to remain alert in order to be aware of and respond to the needs of the mentally retarded clients. Many of the mentally retarded clients were severely

or profoundly retarded, some suffered from medical problems and many exhibited behavioral problems. Plaintiffs sought back straight time and overtime for the overnight hours worked on the basis that the sleep time was in reality work time and should be paid.

Region V claimed to have relied in good faith on opinion letters issued by the Wage and Hour Division of the Department of Labor in accordance with 29 U.S.C. §259.

After a trial to the court, the District Court entered judgment on behalf of the Petitioners/Plaintiffs. In doing so, The District Court specifically found that the Petitioners were always on Region V's premises for the benefit of their employer. The District Court also found that the LSTs were "rarely, if ever,able to obtain an uninterrupted night's sleep."

The Court of Appeals for the Eighth Circuit reversed in part, and finding Region V liable for backpay to only one Plaintiff, Gary Sexton.

ARGUMENT

I.THE COURT OF APPEALS IMPROPERLY DISREGARDED THE FACTUAL FINDINGS UPON WHICH THE DISTRICT COURT BASED ITS CONCLUSION THAT THE DEFENDANT / APPELLANT VIOLATED THE FLSA AND FAILED TO PROVE GOOD FAITH AS REQUIRED BY 29 U.S.C. SECTION 259 WITHOUT FIRST DETERMINING THAT SUCH FACTUAL FINDINGS WERE CLEARLY ERRONEOUS OR THAT FED. R. CIV. PRO. 52(A) WAS OTHERWISE INAPPLICABLE.

Petitioners contend that the Court of Appeals failed to follow the proper standard of review.

The Court of Appeals ruled that the District Court had incorrectly rejected Respondent's claim of reliance upon two opinion letters of the Wage and Hour Division of the Department of Labor in support of Respondents' asserted good faith defense under 29 U.S.C. Section 259. The Court of Appeals reversed the determination of liability under the FLSA as to nineteen of the twenty plaintiffs, stating that the District Court had "applied a legal standard subsequently rejected by this court."

The Court of Appeals for the Eighth Circuit previously addressed the identical issue and the identical opinion letters in Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498 (8th Cir. 1990). Petitioners note that the opinion letters of the Wage and Hour Division which were at issue in Hultgren are the same Wage and Hour opinion letters at issue here.

In Hultgren the Court held that opinion letters of the Wage and Hour Division of the Department of Labor written by Deputy Administrators did constitute the "position of the agency" as required by 29 U.S.C. Section 259 and that the employer was entitled to rely on them. However,in Hultgren the Court determined that the underlying facts, as determined by the District Court, demonstrated a lack of conformity with such opinion letters. The Hultgren

court found the factual findings of the District Court to be not clearly erroneous and affirmed the District Court's holding that the Defendant employer had violated the FLSA and had not acted in "good faith in conformity with" the Wage and Hour Division opinion letters.

In this case the reversal of the District Court by the Court of Appeals derives from the latter's application of the "de novo" standard of review to the record in this case. The Court of Appeals here makes reference to Hultgren and appears to premise its reversal on the District Court's incorrect application of the law relating to Defendant/Appellant's reliance on administrative rulings under Section 259. The majority goes on to reject all factual findings of the District Court and to make its own factual determinations. Petitioners submit that the Court of Appeals was incorrect in doing so.

The District Court made a number of factual findings which impact significantly on the determination of good faith under §259. Those findings are as follows:

1) ". . .Region V does receive a benefit from having the LST's on the premises during sleep-time hours. This is supported by the ample testimony of the LST's concerning the activity of the clients during sleep-time hours and the general inability of the LST's to gain a restful night's sleep." Dist.Ct.Op. at 3.

2) "Among the interruptions which LST's dealt with during sleeptime hours were (1)a client who hit herself and the wall during the night, (2) a client who urinated and defecated on the floor of her bedroom, (3) clients who were incontinent and soiled their beds during the night for which an LST would clean up the client and

change the sheets, (4) clients who woke up during the night and wandered about the residence, (5) clients who needed assistance in using the toilet, including the removal of clothing, wiping and flushing, (6) a client who had tried to leave the residence in the past, (7) clients who woke up during the night, dressed themselves and thought it was time to to work, (8) a client who liked to get out of bed and rearrange things, (9) clients who awoke and became afraid of the sound of wind, thunder, and sirens, (10) a client who spent some nights awake and yelling, (11) a client who had a tendency to steal from other clients at night and damage property, (12)a client who had on occasion had a bowel movement in bed and then smeared it on the wall, (13) clients who came into the room where the LST was sleeping to make sure the LAST was still there, (14) clients who became physically aggressive, (15) a client with diarrhea and a prolapsed bowel, which meant the LST had to check her after each rest room visit to make sure her bowels had not fallen outside her body, and (16) a client prone to epileptic seizures.
Dist.Ct.Op. at 3.

3. That weekday LSTs worked a series

of 17-hour shifts because, despite the Defendant's assertions that these employees were "on-call" within the meaning of 29 C.F.R. §785.17, that the employees were never told that they were on call, never required to carry a beeper,were never required to leave a phone number where they could be reached and were never called in and that the Defendant maintained substitutes available to come in during the daytime hours if necessary. Dist. Ct. Op. at 6.

4. That weekday LST's did not fall within the scope of 29 C.F.R.§785.23 because "Section 785.23 is not applicable to the working conditions of the LST's. Section 785.23 contemplates a situation where an employee would at times be on his or her employer's premises for his or her own benefit. It is clear from the testimony that the LST's were at all times on the group home premises for Region V's benefit, including the period of their sleep time. Section 785.23 speaks of sleep time as one of the 'periods of complete freedom from all duties.' The LST's did not have complete freedom from their duties while they slept. They were required by Region V to remain on the premises to care for and protect the clients after clocking out at night.

Dist. Ct. Op. at 7.

5. ". . .that weekend LST's did work for 24 hours or more..Dist. Ct. Op. at 9.

6. "The greater weight of testimony showed that LST's were rarely, if ever, able to enjoy an uninterrupted night's sleep. In fact, few LST's ever had a night where they received at least five hours of uninterrupted sleep. The demands of their job simply did not allow for such luxury. Dist. Ct. Op.at 9.

7. ". . .testimony by the LST's was that they sometimes, but not consistently, documented sleep-time interruptions on their time sheets.However, this was due in large part to the fact that the LST's were not allowed to document any interruptions which did not last at least 5-7 minutes and could not document interruptions for which they did not have to physically be out of bed. Both Merrill and (sic) Klausterer knew that these were the policies of Region V." Dist. Ct. Op. at 13.

8. "The LSTs employed by Region V were staying at the residences during the nighttime hours for the benefit of Region V, not for their own benefit. The testimony of David Merrill

acknowledges that LST's were responsible for the clients' safety and well-being and were in fact responsible for the clients' lives. He believes that it is the responsibility of an LST to respond to a client during the nighttime hours if the LST has reason to believe a client could cause harm to himself or others,or could cause damage to property. The testimony of the LSTs shows that they believe themselves to function in a parent-like role and that they remained repsonsible for the clients' safety at any time they were on duty, including those hours during which they were allowed to sleep".Dist. Ct. Op. at 9.

9. "I find from the evidence as a whole that Region V knew or should have known that the LST's sleep-time interruptions did occur, and that they were a normal part of the job."Dist. Ct. Op. at 14

The factual findings of the District Court impact on two issues: 1) whether the Respondent's practices violated the FLSA; and 2) whether the Respondent met its burden under 29 U.S.C.§259 in showing good faith reliance on rulings or interpretations of an administrative agency.

In Skidmore v. Swift & Co.,323 U.S. 134 (1944) the Court held that the issue of whether time spent on an employer's premises was working time under the FLSA is a question of fact to be resolved by the trial court. Skidmore at 136. The Eighth Circuit has, in previous cases, adhered to the same standard. Hultgren v. County of Lancaster,

913 F.2d.498 (8th Cir. 1990); Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948).

The question of whether or not the Respondent met its burden of proving good faith under 29 U.S.C. Section 259 is a question of law, which is subject to a de novo review. Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923,926, (11th Cir. 1987).

Good faith under 29 U.S.C.Section 259 requires a showing that the act or omission was (a) taking in good faith and was (2) in conformity with and (3) in reliance on a written administration interpretation by a designated agency." Such a determination is inextricably tied to factual issues. Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498 (8th Cir. 1990). Factual findings of the trier of fact cannot be set aside unless they are shown to be clearly erroneous. Amadeo v. Zant, 486 U.S. 214 (1988); Anderson v. City of Bessemer City, N. C., 470 U.S. 564 (1985).

Of particular significance is the District Court's specific finding that LSTs rarely, if ever, got an uninterrupted night's sleep. This determination by the District Court totally precludes the Respondent from showing actual conformity with the Wage and Hour Division's opinion letters. If the Respondent cannot meet the conformity requirement, there is no way in which it can avail itself of the good faith defense under 29 U.S.C. Section 259. The conformity requirement is precisely linked to the requirement of objective good faith. Hultgren v. County of Lancaster, 913 F.2d 498, (8th Cir. 990); Cole v. Farm Fresh Poultry, 824 F.2d 923,926 (11th Cir.1987).

The Court of Appeals rejected the factual findings upon which the conclusion of the District Court is based and made its' owns factual determinations. If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Anderson v. City of Bessemer City, N.C., 470 U.S. 564,573 (1984). "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual

issues de novo." Id. at 573. "{W}hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by the extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Id. at 575. If the Court of Appeals believed that the clearly erroneous rule was inapplicable here it should be required to state the reasons for that view.

Petitioners submit that the finding by the District Court that LSTs " rarely, if ever," enjoyed an uninterrupted night's sleep is sufficient to rebut actual conformity and deprive the Defendant/Appellant of its good faith defense.

Petitioners submit that in doing so the Court of Appeals failed to adhere to the proper standard of review.

The Court of Appeals, had it followed the proper standard of review and given due deference to the District Court's factual findings, would have been compelled to affirm the decision of the District Court in its entirety.

II. THE COURT OF APPEALS ERRED IN MAKING FINDINGS OF FACT WHICH IGNORED A JOINT STIPULATION OF THE PARTIES THAT, IN ORDER TO AVOID CUMULATIVE TESTIMONY THE TESTIMONY OF ALL PLAINTIFFS TESTIFYING AT TRIAL WOULD BE TAKEN TO

REPRESENT THE WORKING CONDITIONS OF ALL PLAINTIFFS EMPLOYED BY THE DEFENDANT.

In order to avoid cumulative and repetitive testimony and to make expeditious use of trial time, the parties, prior to trial, reached a stipulation that would allow them to avoid the necessity of having all twenty plaintiffs testify in detail as to working conditions they encountered at Region V. They stipulated as follows:

> "To avoid cumulative and repetitive testimony the parties stipulated that the testimony of all plaintiffs who did testify shall be considered to accurately reflect the working conditions for all LSTs who are plaintiffs herein and who were employed by Region V Fairbury for the time period from April 15, 1986, until the present."

Dist. Ct. Op. at 3.(See Bouchard, Filing 48, Huss, Filing 4.

The District Court accepted the stipulation and the parties relied upon them at trial. As a result, only ten of the twenty Plaintiffs testified at trial.

The decision of the Court of Appeals reversed the judgment of the District Court as to nineteen of the twenty plaintiffs, awarding only Gary Sexton backpay and interest. The Court of Appeals based its decision on its determination that the "private quarters" that the Wage and Hour opinion letters required be provided to employees sleeping overnight equated to a bedroom separate from those occupied by Region V's mentally retarded clients. The award of backpay as to Gary Sexton was affirmed by the Court of Appeals solely for the reason that Sexton testified that he had never had a separate bedroom in which to sleep during his entire tenure with Region V.

The District Court accepted the stipulation and incorporated it into its findings. As part of the findings of the District Court, stipulations are governed by Fed. R. Civ. Pro. 52(a). Texas co., V. R.

O'Brien & Co., 242 F.2d 526 (1st Cir. 1957). The Court of Appeals disregarded the stipulation without comment and without first finding it to be clearly erroneous. The testimony relating to working conditions and sleeptime interruptions introduced at trial was consistent and supported the Trial Court's application of that testimony to all plaintiffs. The Court of Appeals' failure to give deference to the stipulation is incorrect and constitutes reversible error.

III. THE COURT OF APPEALS ERRED IN FINDING THAT REASONABLE CONFORMITY WITH WAGE AND HOUR OPINION LETTERS SATISFIES THE REQUIREMENTS OF 29 U.S.C. §259 AND SUCH DECISION CONFLICTS WITH THE ACTUAL CONFORMITY STANDARD ADHERED TO BY OTHER CIRCUITS

Petitioners submit that the Court of Appeals erred in applying a "reasonable conformity" standard to the conformity requirement embodied in 29 U.S.C. §259. The good faith defense set forth in Section 259 is essentially an estoppel defense intended to protect employers from an agency's mistakes in statutory interpretation. Hultgren at 507. To avoid liability under Section 259 an employer must show "that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency." 29 U.S.C. Section 259.

The Eighth Circuit Court of Appeals held in Hultgren that v. County of Lancaster, 913 F.2d. 498,508 (8th Cir. 1990) that the employer must show actual conformity with the interpretation sought to be relied upon. This rule is also adhered to by the Eleventh and Second Circuits. Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 26(11th Cir. 1987); Olson v. Superior Pontiac-GMC, Inc., 765 F.2d 1570,1579-80 (11th Cir. 1985); EEOC v. Home Insurance Co., 672 F.2d 252, 263 (2nd Cir. 1982).

The Court of Appeals applied a different, lesser standard in

determining whether there exists conformity with the administrative interpretation the employer seeks to rely upon in this case: that of reasonable conformity.

The Court of Appeals states:

> We consider this aspect of the Department's Enforcement Policy an unreasonable attempt to dictate the precise nature of relationships that Skidmore and the regulation acknowledge will vary. But in any event, Region V's prior schedule was in reasonable conformity with the regulation and with the February 3, 1981 letter ruling.

Majority Op. at 10,n.3. (Emphasis Supplied).

The Second Circuit , EEOC v. Home Ins. Co, 672 F.2d 252, 265(11th Cir. 1985) stated:

> Section 259's language "in good faith in conformity with," precisely links the question of good faith to an act in conformity, and if there is not conformity, general good faith in other respects cannot save the day.

Petitioners submit that the Court of Appeals has applied a lesser standard that conflicts not only with its own, earlier precedent, but with the rule adhered to by the Second and Eleventh Circuits. Petitioners submit that the correct standard is that of "actual conformity" and that the Court of Appeals erred in its application of the law.

IV. THE FINDINGS OF THE COURT OF APPEALS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD

Petitioners submit that the Court of Appeals made numerous

factual findings de novo. Petitioners believe that virtually all such findings contradict the actual record in this case. To set forth all such factual findings and the transcript references which refute them would contradict Rule 14(g) and 14(j) of this Court which requires a concise statement of the reasons the Writ is sought. Petitioners submit that the substantial conflicts between the Majority's opinon and the record as well as the transcriptual references there to are set forth accurately in the Dissent by Chief Judge Lay. Slip. Op. at 26.

CONCLUSION

Petitioners submit that this Writ of Certiorari brings before the Court substantial and important questions for review. Petitioners pray that the Court grant the Writ of Certiorari so that consideration of such issues may be had.

Dated: Lincoln, Nebraska
February 26, 1992

Respectfully submitted,

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FOR THE EIGHTH CIRCUIT

Nos.90-2015 and 90-2016

Bonnie Bouchard; Rodney Wacker, Vicki Danowicz; Gary Sexton, Jack D. Yates, Jr.; Lawrence E. Yates; Ila Fett; Rosemarie Steel; Daniel J. Rosey; Phyllis Hensley; Kevin Carlson; Jean Peters; Tammy Sue Empfield; Leo F. Prokop, Jr.; Doris Jean Meyer; and Patrick Bouchard,	)
Appellees,	)
v.	)
The Regional Governing Board of Region V Mental Retardation Services and Region V Mental Retardation Services,	)
Appellants.	)
Kevin Huss; Chris Amundson; and Jerry Junker,	)
Appellees.	)

v.)
)
The Regional Governing Board of)
Region V Mental Retardation)
Services, in the official)
capacity, and Region V Mental)
Retardation Services,)
)
)

Appellants.

Appeal From the United States
District Court For the
District of Nebraska

Submitted: January 9,1991

Filed: July 25, 1991

Before Lay, Chief Judge, Magill and Loken, Circuit Judges.

LOKEN, Circuit Judge.

In this Fair Labor Standards Act ("FLSA") case, defendant Region V Mental Retardation Services ("Region V"), a political subdivision of Nebraska, appeals from a judgment awarding over $300,000 in unpaid overtime compensation and attorneys fees to twenty present and former Life Skill Trainers ("LSTs") employed at

residential facilities for the mentally retarded in Fairbury, Nebraska. Plaintiffs cross appeal from the district court's refusal to ward liquidated damages equal to the amount of the unpaid compensation. In rejecting Region V's defense that it relied in
good faith upon written interpretations of the FLSA by the Wage and Hour Division of the U.S. Department of Labor (the "Department"), see 29 U.S.C. Section 259, the district court applied a legal standard subsequently rejected by this court in Hultgren v. County of Lancaster, 913 F.ed. 498 (8th Cir. 1990). Accordingly, we reverse the judgment in favor of all plaintiffs except Gary Sexton.

Plaintiffs brought this action under the private remedies section of the FLSA, 29 U.S.C. Section 216(b), alleging they were entitled to be compensated for all "sleep time" spent on the premises of Region V facilities from April 15, 1986, when the FLSA became applicable to public agencies, see Pub. L. 99-150, 99 Stat. 787 (1985), until November 1989, when Region V adopted a new compensation schedule that eliminated this issue. The district court held that all disputed sleep time was compensable under the Department's applicable regulations, an issue that, for the most part, we need not reach on appeal given our disposition of the Section 259 defense.

The district court further rejected Region V's defense under Section 259, concluding that the defense may not be based upon letter rulings issued by "lesser officials" of the Department. for the reasons explained below, we disagree and hold that, except as to Gary Sexton, the Section 259 defense was proved. Finally, the district court held that plaintiffs were not entitled to liquidated damages because Region V had proved the good faith defense to such damages under 29 U.S.C. Section 260. Our resolution of the Section 259 issue makes it unnecessary to address separately the Section 260 defense.

I.

During the relevant period, Region V's residential facilities each housed from two to four mentally retarded adults in private homes or apartments in the Fairbury community. One or two LSTs resided in each group home when the mentally retarded clients were present. LSTs instructed the clients in social skills necessary for independent living; they also prepared meals, administered medication, reported on each client's needs and progress, and were generally responsible for the clients' safety and well-being at the group home.

The plaintiff LSTs fell into three categories. Weekday LSTs worked at the group homes from Monday afternoon until Friday morning or, later in the damage period, early Friday afternoon. They left the premises only when the clients attended workshops elsewhere. Weekend LSTs were at the group homes with their clients continuously from Friday afternoon until Monday morning. Substitute LSTs replaced either weekday or weekend LSTs and worked the same schedule as the LSTs being replaced. Because of the intricacies of the FLSA sleep time issue, each category of plaintiffs was separately analyzed by the district court and by the parties on appeal.

Prior to 1985, Region V LSTs were paid on a salary basis. In February 1985, the Supreme Court held that the FLSA is generally applicable to state and local governmental units such as Region V. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528. Following Garcia, Region V concluded that is LSTs must be converted to hourly employees subject to the minimum wage and maximum hour (overtime) requirements of the FLSA, 29 U.S.C. 206,207.

Accordingly, Region V administrators obtained wage and hour publications from the Department and received other interpretive materials from the National Association of Private Residential Resources ("NAPRR"), an association of agencies that provide community-based residential support services to some

40,000 mentally retarded and developmentally disabled persons.[1] After reviewing these materials, Region V developed a compensation schedule for the LSTs and prepared a standard Employment Agreement adapted from a form of agreement obtained from NAPRR. Region V counsel approved this form of agreement, and in mid-1985 a copy of the agreement was presented to and signed by each Region V LST. In October 1988, responding to an Enforcement Policy issued by the Department, Region V prepared, with counsel's approval, a revised Employment Agreement containing somewhat modified LST work schedules. The revised agreement was again presented to and signed by each LST. In this lawsuit, plaintiffs claim that Region V violated FLSA because the work schedules in the Employment Agreements provided (with exceptions explained below) that LSTs must spend eight hours of uncompensated sleep time on the premises of the group home each night.

II.

The FLSA requires that covered employees be paid at least the prescribed minimum hourly wage and receive at least 1 1/2 times their regular hourly wage for overtime hours. 29 U.S.C.Section 206, 107. The amount of money an employee must be paid under FLSA cannot be determined without knowing the number of hours worked. In two of its early landmark FLSA decisions, the Supreme Court considered when an employer must compensate for sleep time and other on-premises waiting time that the employer would prefer to designate as "off duty". In Armour & Co. v. Wantock, 323 U.S. 125 (1944), the Supreme Court held that on-premises "time spent in playing cards and other amusements, or in idleness: must be

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[1]NAPRR has been the primary organization with which the Department has communicated since the early 1970's on FLSA issues concerning employees of community-based residential facilities. NAPRR filed an amicus curiae brief supporting Region V's Section 259 defense in this case.

compensated because the employer's fire guards had been hired "to do nothing but wait for something to happen," 323 U.S. at 132, 133. However, the district court's decision to exclude the employees' on-premises time "for sleep and for eating: from the FLSA computation was not at issue, 323 U.S. at 129.

In Skidmore v. Swift & Co., 323 U.S. 134 (1944), decided the same day as Armour, sleep time was included in the waiting time at issue. In reversing a decision that no waiting time was compensable, the Supreme Court held that whether waiting time and sleep time must be compensated in a particular case is a question of fact which:

> involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. . . .The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

323 U.S. at 137. The Court noted that the Department had filed an amicus brief urging the "the exclusion of sleeping and eating time. . .and the inclusion of all other on-call time,"323 U.S. at 139. Without accepting or rejecting this conclusion, the Court stated, "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and

informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140.

An employer charged with violating the minimum wage or maximum hour provisions of FLSA is given an affirmative defense in Section 259, which provides that,

> no employer shall be subject to any liability. . .for . . .failure. . .to pay minimum wages or overtime compensation. . .if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of {the Department}. . .or any administrative practice or enforcement policy. . . . .

Section 259 was enacted in 1947 in response to Congress; perception that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C.Section 251(a). Thus, the deference to employment agreements mandated by the Supreme Court in Skidmore is particularly appropriate in the context of the Section 259 good faith defense.

In 1961, the Department issued an interpretive bulletin that is now Part 785 of the Wage and Hour Division Regulations, 29 C.F.R. Part 785, discussing what constitutes compensable work time for FLSA purposes. Several provisions deal with sleep time issues. 29 C.F.R. Section 785.20-23. Beginning in 1980, in response to inquiries from trade associations such as NAPRR, the Department issued a series of letter rulings applying its regulations to the sleep

time of "houseparents" at "community residences for the mentally retarded." In January 1988, the Department suspended its' numerous compliance investigations of group homes around the country [2] to develop a consistent enforcement policy. On June 30, 1988, the Department promulgated an Enforcement policy. On June 30, 1988, the Department promulgated an Enforcement Policy "refining and restating" the interpretations set forth in its earlier letter rulings. this Enforcement Policy expressly stated that the Department : "will not initiate any new investigations of residential care facilities which involve only an assertion that improper sleep time deductions are being made by a group home employer until 90 days from the date of this enforcement policy statement."

Under the FLSA, this moratorium on public enforcement did not preclude Section 216(b) private actions such as this. However, it reflected the agencies judgment that the difficult compliance questions facing this industry should be resolved by prospective enforcement. Therefore, the district court's decision to award substantial retroactive overtime liability against this public agency defendant must be "justified by very good reasons," Skidmore, 323 U.S. at 140.

III.

In 1985, when Region V obtained interpretive materials from the NAPRR, developed the hours-worked schedules for LSTs and prepared the standard Employment Agreement signed by each LST, it relied upon three letter rulings issued by the Department that dealt with this industry. In rejecting the Section 259 defense, the district court held that Region V was not entitled to rely upon these rulings

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[2] Unlike the defendant in Hultgren, Region V had not been the subject of any investigation or enforcement litigation by the Department.

because they were signed by a Deputy and an Assistant Administrator who were "lesser officials within the agency." The district court then concluded that Region V had not acted "in good faith in conformity with" the regulations, based upon the court's own interpretation of the regulations rather than the Department's interpretation as reflected in the letter rulings.

This Court's subsequently decision in Hultgren held that the Deputy and Assistant Administrator's letter rulings, including two of the same letters at issue here, "may properly be characterized as the position of the agency for purposes of section 259," 913 F.2d at 507. Thus, the district court erred in limiting its Section 259 inquiry to the regulations alone. We must consider whether Region V met the good faith reliance standards under Section 259, taking into account both the Department's regulations and the agencies letter rulings. The good faith test under Section 259 is an objective one. Hultgren, supra, 913 F.2d at 507. We conclude that Region V proved the Section 259 defense with respect to each of the three categories of LSTs.

Weekday LSTs. These full-time employees remained at Region V premises from Monday afternoon until Friday. Pursuant to the compensation schedule in the Employment Agreement, they were paid for approximately 40 Duty Hours. Unpaid time included (a) "Off Duty," from 8:00 a.m. to 3:30 p.m. each day, when the clients were away from the group homes, and "Evening Hours, " defined as the period form 10:00 p.m. to 6:00 a.m. when the LSTS were expected to sleep in private quarters at the group home.

Sleep time was not compensated except in two situations: first, if a client needed attention for at least 5-8 minutes during sleep time, the LST would be compensated for the time actually spent on duty; second, on any night when client interruptions totaled three hours or more, the LST would be paid for the entire eight hour sleep time period. LSTs were required to record all such compensable sleep time interruptions on their time cards. They were paid 1/1/2

times their hourly rates for hours worked over 40 per week, including compensable sleep time.

Section 785.22 of the Department's sleep time regulations provides that, if an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude "a bona fide regularly scheduled sleeping period of not more than 87 hours" from hours worked. The employer must furnish "adequate sleeping facilities, " and sleep time conditions must be such that the employee "can usually enjoy an uninterrupted night's sleep." Sleep time interruptions must be compensated "if the employee cannot get at least 5 hours' sleep during the scheduled period." This regulation is based upon decisions such as Skidmore and Rokey v. Day & Zimmerman, Inc., 157 F.2d 734 (8th Cir. 1946), cert.denied, 330 U.S. 842 (1947).

Section 785.23 of the regulations broadens the sleep time exception for an employee who resides on the employer's premises for "extended periods of time." Consistent with the Supreme Court's admonition in Skidmore, this regulation states, "It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." This general guideline was clarified with respect to "houseparents sleeping at community residences for the mentally retarded" in a letter ruling of the Deputy Administrator dated February 3, 1981:

> In general, we take the position that employees who reside on their employer's premises five days a week are considered to reside there "for extended periods of time." Where the facilities offered by the employer provide a home-like environment with private quarters separate from the residents of the

> group home, we would regard such employees as residing there, even though they may have another residence which they may regard as their principal residence. . . {W}here employees are on duty for less than 120 hours in a week, they can be considered as residing on the employer's premises, provided that they spend five consecutive days or five consecutive nights on the premises.

Region V argues that it was not required to compensate Weekday LSTs for their sleep time (except when interrupted) because these employees resided on the employer's premises for extended periods of time within the meaning of Section 785.23, as interpreted in the February 3, 1981 letter ruling, and because they were properly compensated for sleep time interruptions in accordance with Section 785.22.

It is apparent that the work schedules for Weekday LSTs reflected in Region V's Employment Agreements were based upon and were in concept consistent with the Department's regulations, as clarified by the Deputy Administrator's letter ruling. Weekday LSTs resided at the Region V group homes for consecutive five day and four night periods.[3] They were provided private sleeping rooms, and

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[3]The Department's June 1988 Enforcement Policy provided that, to reside on the employer's premises for an extended period of time under Section 785.23, an employee must be compensated "for at least eight hours in each of five consecutive 24-hour periods." As a result of this change--described by the Department as a refinement--

(continued...)

the group homes were intended to provide a "home-like environment." The LSTs were compensated for recorded sleep time interruptions and were paid for any eight hour sleep period in which client interruptions totaled three hours or more.

The district court nonetheless concluded that Section 785.23 was not applicable to the Weekday LSTs because they were on the premise at night to protect the clients, to the employer's benefit, and thus were "engaged to wait" within the meaning of Skidmore. The district court further reasoned that Region V knew that LSTs sleep was frequently interrupted by client needs and therefor that the LSTs were engaged to wait within the meaning of Section 785.14 of the regulations, thereby precluding a Section 259 good faith defense. We disagree.

Region V relied upon written agency interpretations specifically addressing working conditions in the group home industry. After considerable study of the industry, the Department issued letter rulings that houseparents who work five day-four night schedules comparable to those of the Weekday LSTs do reside on the employer's premises for extended periods of time within the meaning of Section 785.23 and therefor may be afforded, pursuant to a written employment agreement, up to eight hours of unpaid

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[1](...continued)
Region V revised its work schedule for Weekday LSTs to provide for eight compensated hours each day, Monday through Friday, and reflected this new schedule in the October 1988 Employment Agreement. We consider this aspect of the Department's Enforcement Policy an unreasonable attempt to dictate the precise nature of relationships that Skidmore and the regulation acknowledge will vary. But in any event, Region V's prior schedule was in reasonable conformity with the regulation and with the February 3, 1981 letter ruling.

sleep time per day in private quarters on the employer's premises. The Department's interpretation of its own regulation is reasonable on its face and is entitled to deference by the courts and contracting parties. Region V could reasonably assume that the Department was familiar with the nighttime duties of houseparents for the mentally retarded; thus, Region V's reliance upon the February 3, 1981 letter ruling in developing the work schedules contained in its Employment Agreements with the Weekday LSTs was plainly reasonable.

The district court's reliance upon Section 785.14 of the regulations was misplaced. Section 784.14 deals generally with "Waiting Time." As the Supreme Court decisions in Armour and Skidmore and the position of the Department in those cases make clear, sleep time raises different compensation questions under the FLSA than do other types of waiting time. See also Halferty v. Pulse Drug Co., 864 F.2d 1185, 1189-1191 (5th Cir. 1989). Section 785.23 of the regulations specifically addressed the question of sleep time, and the Department's letter ruling clarified the application of the regulation to this industry. None of these letter rulings, including the June 1988 Enforcement Policy, even referred to Section 785.14. Accord, Beaston v. Scotland School for Veteran's Children, 693 F.Supp. 234 (M.D. Pa. 1988), aff'd 869 F.2d 587 (3d Cir. 1989). Given Congress' statement of purpose in enacting Section 259, "in close cases we should consider the expectations of the contracting parties and the reasonableness of the employer's actions in light of the administrative interpretation in question." Marshall v. Baptist Hosp., 668 F.2d 234, 238 (6th Cir.1981) (where the administrative interpretation was ambiguous, employer that reasonably relied on the Department's specific rule, rather than its indefinite standard, was entitled to the Section 259 defense.)

Appellees argue that the Weekday LSTs never resided on Region V's premises for an extended period of time because they "worked a series of sixteen or seventeen hour shifts." However,

the fact that LSTs left the premises during their off duty daytime hours, when the clients were off the premises, did not render Section 785.23 of the regulations inapplicable. Region V had to allow the LSTs to use this time effectively for their own purposes, or it would have been compensable hours worked. See 29 C.F.R. Section 785.23 expressly states that an employee who resides on the employer's premiss for an extended period of time may have "periods of complete freedom from all duties when he may leave the premises for purposes of his own." Therefore, the fact that Region V's Employment Agreement expressly granted Weekday LSTs such periods of off-duty time is consistent with Section 785.23 and does not undermine the Section 259 good faith defense.

Appellees and the dissent further contend that Region V must be denied the good faith defense because it unilaterally drafted the Employment Agreement and "forced it on" the LSTs. We disagree. The 1985 Employment Agreement essentially codified the parties' prior employment relationship under work schedules adapted to comply with FLSA. It did not obligate LSTs to accept either reduced total compensation, longer hours, or increased responsibilities than they had agreed to work prior to the Garcia decision. The Employment Agreement served the purpose of advising the LSTs in advance of the circumstances under which their sleep time would be compensated. See Ariends v. Olin Mathieson Chem. Corp., 382 F.2d 192, 197 (6th Cir. 1967). Region V permitted minor schedule variations for the convenience of individual LSTs, and it obtained the views of LSTs before implementing the revised work schedules contained in the 1988 Employment Agreement.

The LSTs had no collective bargaining representative. Region V circulated its proposed Employment Agreements to each LST, and there is no evidence that any LST refused to sign either agreement. In the context of the Section 259 defense, we conclude that the Employment Agreements in this case satisfy the standard,

under Skidmore, that " 'any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.'" Halferty v. Pulse Drug Co., 821 F.2d 261, 269 (5th Cir. 1987) (quoting Skidmore, 323 U.S. at 137), appeal after remand, 864 F.2d 1185 (5th Cir. 1989). Accord, General Elec.Co. v. Porter, 208 F.2d 805, 814 (9th Cir.),cert. denied, 347 U.S. 951 (1954). any other decision would violate Congress' stated purpose not to award employees "windfall payments. . . of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay." 29 U.S.C. Section 251(a)(4).

Finally, the dissent argues that Region V must be denied the Section 259 defense because it did not provide the LSTs a "home-like environment." The dissent bases its definition of home-like environment on the Department's June 30,1988 Enforcement Policy. However, Region V had to comply with FLSA after Garcia in 1985. Thus, the Department's February 1981 letter ruling, upon which Region V's compliance program was based, is far more relevant to the Section 259 defense. On the home-like environment question, the February 1981 letter ruling stated:

> The houseparents and relief staff sleep in private quarters separate from the mentally retarded residents of the group home. The actual facts differ somewhat from facility to facility, but the above description sets forth the typical situation as it has been explained to us.
>
> * * * *
>
> Where the facilities offered by the employer provide a home-like environment with private quarters separate from the residents of the group home, we would regard such

> employees as residing there, even though they may have another residence which they may regard as their principal residence. In light of the amount of time they spend at the group home, it is in effect a second residence.
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> * * * *
>
> We have reached this conclusion {regarding relief employees}, which represents a departure from the general rule under 29 C.F.R. 785.21, because of the home-like environment afforded to those employees in community residences, with private quarters and other amenities and where employees do in fact get a reasonable nights sleep

It is apparent that the Department's rulings on this subject changed over the 1981-1988 period, from a general pronouncement in 1981 that the home-like environment inherently available in these group homes must include private quarters where LSTs could get a reasonable nights's sleep, to detailed specifications in 1988 as to the furniture and the cooking, eating, and bath facilities that had to be provided separately to these employees.

The issue here is whether sleep time must be compensated. Where an employee is furnished reasonable sleeping facilities under conditions that satisfy Skidmore and the regulations, the Department may not deny the exclusion of sleep time because the employer did

not provide employees with other "amenities" unrelated to their sleep time. See Van Dyke v. Bluefield Gas. Co., 210 F.2d 620 (4th Cir. 1954). Thus, it is clear to us that Region V acted in good faith conformity with the regulations and the Department's February 1981 letter ruling so long as it provided LSTs with a separate sleeping room and the LSTs got at least five hours sleep per night, which Section 785.22(b) of the regulations defines as "an uninterrupted night's sleep."

Weekend LSTs. These full-time employees were on Region V premises continuously from Friday afternoon to Monday morning. The Employment Agreements provided that all hours between 3:30 p.m. Friday and 8:00 a.m. Monday would be compensated except for sleep time from 10:00 p.m. to 6:00 a.m. each night. Interrupted sleep time was compensable under the same circumstances as for Weekday LSTs.

Region V contends that the Weekend LSTs' work schedules were intended to and did in fact meet the Section 785.22 standards for unpaid sleep time for employees "required to be on duty for 24 hours or more," as construed in the February 3, 1981 letter ruling. Appellees and the district court concede that Region V's work schedule for the Weekend LSTs was, in concept, consistent with Section 785.22 as clarified by this letter ruling. Nevertheless, the district court held that weekend LSTs did not fall within this exception because they rarely had a night where they received "at least five hours of uninterrupted sleep." However, this is not a basis for rejecting Region V's Section 259 defense because it misconstrues the regulation.

Section 785.22 allows unpaid sleep time for employees who "can usually enjoy an uninterrupted night's sleep. The regulation defines "uninterrupted" as meaning, " that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time." Here, the LSTs testified that their sleep time was frequently interrupted for short periods (which they usually did not

record on their time cards); their time cards reflected that they typically did get at least five hours sleep in total each night. The regulation plainly states that the required five hours' sleep need not be consecutive hours. This was confirmed by the Department's letter ruling of August 20,1985, which stated:

> {I}f an employee's sleeping time is interrupted to such an extent that the employee cannot get at least five hours' sleep during the scheduled period, then all hours of the sleeping period are compensable hours of work.

The Department's view on this was even more clearly stated in is May 1985 WH Publication 1459, entitled "State and Local Government Employees Under the Fair Labor Standards Act."

> The 5 hours of sleep need not be 5 continuous uninterrupted hours of sleep. However, if interruptions during the sleep period are so focused as to prevent reasonable periods of sleep totaling at least 5 hours, the entire period would be considered hours worked.

In sum, Region V and the LSTs entered into Employment Agreements providing for sleep time compensation consistent with Section 785.22, and requiring the LSTs to record compensable sleep time on their time cards. Region V paid the LSTs for all recorded compensable sleep time. Under these circumstances, Region V's Section 259 defense may not be defeated by the LSTs' general testimony that their sleep time was frequently interrupted for uncertain lengths of time which they chose not to reflect on their

time cards. See, Davis v. Food Lion, 792 F.2d 1274, 1276-1277 (4th Cir. 1986).

We note that this factor distinguishes this case from Hultgren which did not involve full-time employees such as the Weekday LSTs and the Weekend LSTs, this court rejected the employer's good faith claims, despite holding that it was entitled to rely upon the Department's letter Rulings, because the district court had specifically found that " relief employees averaged from zero to four hours of sleep during the nighttime hours," 913 F.2d at 508. this essential fact made the employer's sleep time conditions obviously inconsistent with the Department's regulations and its letter rulings, and thus compelled the conclusion that the employer's Section 259 good faith defense must be rejected.

Substitute LSTs. These employees replaced both Weekday LSTs and Weekend LSTs when needed. Each worked the same schedule as the LST being replaced. The Employment Agreements defined the paid work day for substitute LSTs as 3:30 p.m. to 10:00 p.m. and 6:00 a.m. to 8:00 a.m. during each shift worked, with the Evening Hours again being unpaid.

The issue of when sleep time must be paid to substitute or relief houseparents in community homes was specifically addressed in two of the Deputy Administrator's letter rulings. The February 3, 1981 letter stated:

> Your third and final question related to employees who do not reside at the community residences but who, as relief employees, remained there for at least 24 hours, and often as long as two or three days. . .(Although) such employees. . . .are arguably on duty for less than 24 hours. . .we believe that such sleep time can be deducted

> from hours worked, provided that the employer and employees agree in advance to do so, and that no more than 8 hours per night (or actual, uninterrupted sleeptime, if that is less than 8 hours) is deducted.

By letter dated August 20, 1985, the Deputy Administrator responded to a request for further clarification of the Department's position regarding houseparent sleep time:

> We have review all available information, including that furnished by you and that obtained from a review of a large number of case files involving investigations of community residences under FLSA. As a result of this comprehensive review, we have concluded that, because of the special circumstances that prevail in community residences, and because relief employees perform essentially the same duties as regular full-time employees, the same "hours worked" principles should be applied to both categories of employees. . .Therefore, it is our opinion that, in situations where a community residence employs one or more full-time employees who reside on the employer;s premises for extended periods of time, the

> employer and a relief employee who performs essentially the same duties as such full-time employees may agree, in advance of the performance of any work, that sleeping time of up to eight hours can be excluded from compensable hours of work, regardless of the length of the tour of duty involved.

In Hultgren, the issue was whether FLSA required the employer to compensate the sleep time of relief assistants who replaced resident managers one or two days a week at residential facilities for the mentally retarded in another county of Nebraska. However, because the resident managers were exempt, the relief employees in Hultgren were not entitled to the "departure" from the regulations explained in the above letter rulings. Here, on the other hand, Region V's full-time employees--the Weekday LSTs and the Weekend LSTs- were allowed uncompensated sleep time, and thus Region V acted consistently with the letter rulings in providing uncompensated sleep time for the Substitute LSTs on the same basis. Accordingly, Region V has established its 259 good faith defense with respect to this category of employees as well.

Gary Sexton. This former Weekend LST testified that he was never afforded a private sleeping room at the group home at which he worked, which Region V stopped using in early 1989. Although the record included photographs of the private sleeping rooms that Region V provided at each of the group homes operating at the time of trial, Region V did not rebut Sexton's testimony that he was never afforded a private room during his employment as a Weekend LST. Region V's Section 259 good faith defense was based upon Department letter rulings that uniformly required that LSTs be furnished private sleeping quarters. Region V knew of this

requirement and failed to comply with it at the group home where Sexton worked. Therefore, as to Sexton, we affirm the district court's decision that all sleep time was compensable under FLSA, that Region V failed to prove the Section 259 defense, but that liquidated damages should not be awarded.

IV.

The Section 259 defense is "jurisdictional in nature." Marshall v. Baptist Hosp., supra, 668 F.2d 'at 239. Thus, our conclusion that Region V established the defense as to each category of LSTs ends our inquiry. Accordingly, the judgment of the district court is reversed as to all plaintiffs except Gary Sexton, as to whom it is affirmed. The award of attorneys' fees is vacated and remanded to the district court for further proceedings consistent with this decision.

LAY, Chief Judge, dissenting.

I respectfully dissent.

The reversal of the judgment of the district court constitutes a gross injustice to a dedicated working class of people. The majority opinion fails (1) to give due deference to the district court's factual findings; (2) to adhere to a controlling precedent of this circuit, Hultgren v. County of Lancaster, Neb., 913 F.2d 498 (8th Cir. 1990);[4] and (3) to give proper weight to a record that is virtually undisputed.

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[4] The Hultgren case is identical in fact and law to the present case. It is indistinguishable. I respectfully submit our failure to apply the controlling principles of our own precedent can only result in confusion to the Department of Labor, litigants, and the bar.

DISCUSSION

The fundamental issue, as posed by the majority opinion, is whether Region V is entitled to a good faith defense, under 29 U.S.C. Section 259 (1988), [5] for violating the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Section 201 (1988). The district court's findings that Region V failed to properly provide compensation for "sleep time" for all three classes of Life Skills Trainers ("LSTs") is unassailable. Under the clearly erroneous rule, these findings cannot be set aside. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74 (1985).

The majority side-steps Region V's gross violations of the FLSA by holding that Region V's acts or omissions were

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[5] Section 259(a) provides:

In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, . . .if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling approval, modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. Section 259(a) (1988).

nevertheless taken in good faith because of their attempted conformity with and reliance on written administrative interpretations by a designated agency.[6] The good faith defense to liability for FLSA violations requires that Region V prove that the act or omission was "(1) taken in good faith and was (2) in conformity with and (3) in reliance on a written administrative interpretation by a designated agency." Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 926 (11th Cir. 1987); see also 29 U.S.C. Section 259 (a) (1988). Whether Region V is entitled to the good faith defense embodied in section 259 is a question of law that is reviewed de novo. Cole, 824 F.2d at 926. The record here clearly establishes that Region V's actions did not adhere or even attempt to conform to the Department of Labor's ("Department") regulations and opinion letters in good faith."'The "good faith" defense is not available to an employer unless the acts or omission complained of "were in conformity with" the regulation. . . . This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary." Olson v. Superior Pontiac-GMC, Inc. 765 F. 2d 1570, 1580 (11th Cir. 1985) (quoting 29 C.F.R. Section 790.14(a). Region V has the burden to

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[6]The majority initially premises its reversal on the district court's mistaken view that because some of the administrative letters were written by lesser officials within the agency Region V was not entitled to rely on them. This interpretation was deemed erroneous by this court in Hultgren but we nevertheless affirmed the same district court's holding that FLSA was violated and that there was no good faith conformity with the letters. This issue is not determinative here any more than it was in Hultgren. The district court analyzed all the regulations and the key administrative letters. The majority relies on all the letters in holding good faith conformity. Therefore, the basic principle upon which the majority premises its reversal--"the district court applied a legal standard subsequently rejected by this court"--is irrelevant.

establish that it conformed with the letters in good faith. "this is not a requirement of a showing of general good faith; the Portal Act language, 'in good faith in conformity with,' precisely links the question of good faith to an act in conformity, and if there is no conformity, general good faith in other respects cannot save the day." EEOC v. Home Ins. Co., 672 F.2d 252, 265 (2nd Cir. 1982).

The fundamental issue in determining if Region V violated FLSA, and identical to the issue in Hultgren, is whether "sleep time is work time." As we stated in Hultgren, this issue is a question of fact "which must be determined, 'in accordance with common sense and the general concept of work or employment.'"Hultgren, 9132 F.2d at 504 (quoting Central Mo.Tel.Co. v. Conwell, 170 F.F2d 641, 646 (8th Cir. 1948);. Our court stated that the "issue, at bottom, is whether the employee's time is spent predominantly for the benefit of the employer or the employee."Hultgren, 913 F.2d at 504 (citing Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944). In bypassing the district court's findings that Region V violated FLSA, the majority obviates much of the harshness and unfairness created by Region V to the employee involved. These findings, I believe, are directly relevant to the good faith conformity which the majority chooses to discuss in its single issue analysis. The district court specifically found that the "LST's employed by Region V were staying at the residences during the nighttime hours for the benefit of Region V, not for their own benefit." Mem. Op. at 9. this finding is not clearly erroneous.[7]

In the present case, the district court found, "from the evidence as a whole that Region V knew or should have known that the LST's sleep-time interruptions did occur, and that they were a normal part of the job." Id. at 14. According to the district court

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[7]Even Region V's employment agreement states that the employees are sleeping at the residences for Region V's benefit. Jt.App. at 47.

> {t}estimony was received regarding interruptions incurred by plaintiffs working all three different shifts. To avoid cumulative and repetitive testimony the parties stipulated that the testimony of all plaintiffs who did testify shall be considered to accurately reflect the working conditions for all LSTs who are plaintiffs herein and who were employed by Region V Fairbury for the time period from April 15, 1986, until the present.

Id. at 3 (Citations omitted) (Emphasis added).

If substantial evidence on the record exists, as in this case, this court must show great deference to the district court's findings of fact. The majority asserts that "Region V's Section 259 defense may not be defeated by the LSTs general testimony that their sleep time was frequently interrupted for uncertain lengths of time which they chose not to reflect on their time cards." Maj. Op. at 16-17. The district court found,however, that the sleep time interruptions were not documented on the employees' time cards because "the LST's were not allowed to document any interruptions which did not last at least 5-7 minutes and could not document interruptions for which they did not have to physically be out of bed." Mem.Op at 13; see also Tr. at 131-32, 136-37, 142, 196-97. 212-14, 278, 298, 405-07, 412-14. These facts parallel Hultgren. See Hultgren, 913 F.2d at 506. The majority distinguishes Hultgren,on the ground that the district court in Hultgren expressly found that the employees had less than five hours sleep. Maj. Op. at 17. The majority overlooks the district court's identical finding here. The district court in this case found that "few LST's ever had a night where they received at least five

hours of uninterrupted sleep. The demands of their job simply did not allow for such luxury." Mem. Op. at 9. Region V's employees were also discouraged from documenting overtime hours because of budget problems. Tr. at 345. Region V knew about sleep time interruptions because of the frequent complaints from employees. Tr. at 179, 387-88, 503-05, 675,963. "{G}ood faith requires the employer to have honesty of intention and to be without knowledge of circumstances which ought to put him upon inquiry." Olson, 765 F.2d at 1580 (Citing 29 C.F.R. Section 790.15 (1984)). The trial transcript is replete with testimony regarding the numerous and diverse nighttime interruptions the LSTs experienced. The district court found that

> {a}mong the interruptions which LST;s dealt with during sleep-time hours were (1) a client who hit herself and the wall during the night, (2) a client who urinated and defecated on the floor of her bedroom, (3) clients who were incontinent and soiled their beds during the night for which an LST would clean up the client and change the sheets, (4) clients who woke up during the night and wandered about the residence, (5) clients who needed assistance in using the toilet, including the removal of clothing, wiping and flushing, (6)a client who had tried to leave the residence in the past, (7) clients who woke up during the night, dressed themselves and thought it was time to go to work,

> (8) a client who liked to get out of bed and rearrange things, (9) clients who awoke and became afraid of the sound of wind, thunder, and sirens, (10)a client who spend some nights awake and yelling, (11)a client who had a tendency to steal from other clients at night and damage property, (12) a client who on occasion had a bowel movement in bed and then smeared it on the wall, (123) clients who came into the room where the LST was sleeping to make sure that the LST was still there, (14) clients who became physically aggressive, (15) a client with diarrhea and a prolapsed bowel, which meant the LST had to check her after each restroom visit to make sure her bowels had not fallen outside her body, and (16) a client prone to epileptic seizures.

Mem. Op. at 3; see also TR. at 23-26, 28-29, 31-33, 35-37,151-62,168-69,266-71, 274-75, 341-=42, 351-58, 364-67, 396-99, 404-06, 4376-53, 509-12, 534-4-. These sleep time conditions are as "obviously inconsistent with the Department's regulations and its letter rulings" in this case as they were in Hultgren. See Maj. Op. at 17 (emphasis omitted).

The record and the district court's findings clearly demonstrate that the alleged conformity to the Department's hours requirements did not exist. However, assuming, arguendo, that there

was compliance with the scheduled hours the Department's directives required, the good faith defense still must fail because of two basically undisputed deficiencies in Region V's attempted conformity.

In Hultgren, we held that the employer did not conform in good faith to the agency directives because (1) the employer failed to provide the required "home-like environment" consisting of private quarters, and (2) only a unilateral agreement enforced by the employer existed.[8] Hultgren, 913 F.2d at 506.

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[8]The court in Hultgren observed:

> Even assuming section 785.22 of the regulations applies, both this regulation and the opinion letters from the Wage & Hour Deputy Administrator are premised on the notion that employees are able to get a full night's sleep and are provided with adequate sleeping facilities or home-like environment in a group home setting. The sleeping accommodations for plaintiffs in this case, who were generally in a different group home each night they worked and who often slept on a sofa or a hide-a-bed in the living room, are simply not the same as the environment envisioned by the opinion letters. Moreover, plaintiffs did not usually enjoy an uninterrupted night's sleep, both because of [the] nature of their sleeping accommodations and because, as a general rule, the clients who resided in {the employer's} facilities were "prone to being up at night, often frequently, and on a consistent basis over time." Thus, the very nature of plaintiff's jobs required that they be ready for frequent nighttime interruptions."

(continued...)

The record in this case overwhelmingly establishes that Region V failed to provide its employees with private quarters in a homelike environment and that it required the employees to sign a unilateral non-negotiable agreement.

I. Absence of Home-like Environment

The June 30,1988, letter from the Department defines "private quarters" to be furnished living quarters that are separate from the clients and from any other staff members, have as a minimum the same furnishings available to the clients and enable the employees to leave his or her belongings there during on and off duty periods. Appellant's App. at 31. A "home-like environment" is defined as facilities including private quarters and also including on the same premises facilities for cooking and eating, for bathing in private, and for recreation. The amenities and quarters must be

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[8](...continued)

> Nor did plaintiffs agree that their "sleep time" could be uncompensated. The Deputy Administrator's 1985 opinion letter stresses that only "mutually agreed-upon sleep time may be excluded: the exclusion of sleep time may not be the "unilateral decision of the employer." The magistrate in this case found {the employer's post Garcia v. San Antonio Metropolitan Transit Authority,469 U.S.528 (1985)}contracts "were drafted exclusively by the defendant with no input or negotiation from the plaintiffs or even any bargaining agent for them. . . .The evidence is uncontradicted that the contracts at issue in this case were most certainly presented on a take-it or leave-it basis without any possibility for negotiation by the plaintiffs."

Hultgren, 913 F.2d at 506.

suitable for long-term residence by individuals and be similar to those found in a typical private residence or apartment, rather than those found in institutional facilities such as barracks, dormitories, and short-term facilities for travelers. Id. at 32.

It is virtually undisputed that Region V did not provide private quarters and a home-like environment for the employees. The district court relied upon a stipulation that the testimony of all of the employees who did testify "shall be considered to accurately reflect the working conditions for all LST's who are plaintiffs." Mem.Op. at 3. The majority holds that Gary Sexton's sleep time should be compensated because he was never given a private bedroom. Patrick Bouchard also testified that he never had a private bedroom. He testified that he had to sleep on a couch in the living room because of the condition of the staff bedroom in this group home. He testified that the bed was stained and smelled of urine, body odor, and leakage from a staff person who had a tracheotomy. Tr. at 337-40; see also Tr. at 369-70. The stipulation makes the testimony of Sexton and Bouchard binding as to all the employees. All the agency letters assumed that the employees had a "home-like environment" with a private bedroom. The record presents a vivid and startling contrast. There was testimony that in some cases the employees slept on couches in the living rooms, on roll away beds in the kitchen, or on the floor either because there was no private bedroom or the bed was not in a sanitary condition. Tr. at 51-52, 74, 145-148, 191-93, 261-63, 336-40,431-33, 541-43. There is little evidence that any of the employees had private quarters where they could leave their belongings during on and off duty periods. Tr. at 44, 147-48, 261-63, 339, 432, 542. Most of the employees testified that they could not leave any of their personal belongings in the homes while they were off duty because the clients would get into them. Id.

II. The Unilateral Agreement

Region V did not negotiate with its employees on the issue

of sleep time compensation. It created its own employment agreement from a sample agreement obtained from the National Association of Private Residential Resources ("NAPRR"). The NAPRR had advised Region V that the agreement had been approved by the Department. Region V deleted portions of the sample agreement discussing the value of room and board provided to the employee by the employer. Region V';s agreement stated that "since both the meals and quarters made available to EMPLOYEE are for REGION V's convenience, no value is assigned to room and board for pay purposes, and no charge is made to EMPLOYEE for them." J. App. at 47. Region V also did not include the "Employment Agreement Pay Schedule Breakdown" that was attached to the sample agreement as part of the contract. The pay schedule breakdown applies a fixed dollar value to the employee's use of the premises and it specified the number of hours excluded pursuant to the terms of the agreement. Region V did not distinguish between the employer's premises and the employee's living quarters as did the sample agreement. It also added a clause stating that all overtime had to be documented with incident reports. Region V never asked legal counsel to review the agreement regarding the sleep time exclusion. Tr. at 765-768. It only asked counsel to review the agreement for "legal problems." Tr. at 768; Jt. App. at 89-90.

Any agreement to exclude sleep time must be "mutually agreed upon."[9] Region V did not attempt to reach a "mutually agreed-upon" decision that sleep time would be uncompensated. The 1985 opinion letter stated that the employer could not unilaterally decide to exclude sleep time from compensation. Appellant's App. at 27. Region V's employees had no input into the terms of the

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[9]The facts here are nearly identical to Hultgren, reflecting that it is not so easily distinguishable. As in Hultgren, the agreement here was "the unilateral decision of the employer." Hultgren, 913 F.2d at 506.

agreement. Tr. at 599, 772. Region V required its employees to individually sign the employment agreement to receive their paychecks. Tr. at 55-58, 135, 176-77, 418, 454-57, 543-44, 963. The majority contends there was no evidence that the employees refused to sign the agreement but it is difficult to refuse to sign under the duress of a withheld paycheck.

III. Nonconformity with Agency Regulations and Directives

In addition to nonconformity with the Department's directives regarding home-like environment and a negotiated agreement, Region V also was not in actual conformity with the regulations and directives concerning the number of hours worked before an employer can exclude sleep time.

A. Weekday LSTs

An employer must pay an employee for sleep time unless the employees' work schedule falls under one of the exceptions contained in the regulations. Region V argues that it excluded sleep time in the good faith belief that its employees fell under the exceptions. The weekday LSTs' schedule did not comply with any of the exceptions. [10]They did not qualify for the exception under 29 C.F.R. Section 785.22 (1987), because they were not on duty twentyfour hours or more.[11] The weekday LSTs were off duty for

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[10]Weekday LSTs worked Monday 3:30 p.m. to 10:00 p.m.. (slept from 10:00 p.m. to 6:00 a.m. Monday through Thursday), Tuesday to Thursday 6:00 to 8:00 a.m., 3:30-10:00 p.m. (off-duty free time from 8:00 a.m. to 3:30 p.m. Monday through Thursday), and Friday 6:00 to 8:00 a.m.

[11]Section 785.22 provides that:

(continued...)

several hours everyday and according to the Department's interpretations of the regulations this interruption kept the employees from qualifying for this exception. Appellant's App. at 34 (June 30, 1988 letter). The weekday LSTs also did not qualify for the "residing for extended periods of time exception," under 29 C.F.R. Section 785.23 (1987) because they did not work eight hours in five

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[11](...continued)

> (a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly schedule sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.
>
> (b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

29 C.F.R. Section 785.22 (1987) (citations omitted).

consecutive twenty-four hour periods.[12] Jt. App. at 73 (July 27, 1987), which requires the employer to compensate them for sleep time.[13] To qualify for these exceptions not only does the

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[12]Region V places the most reliance on section 785.23. This regulation states:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

29 C.F.R.Section 785.23(1987) (citations omitted).

[13]Section 785.21 discusses employees on duty less than twenty-four hours. It states that:

> An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is

(continued...)

employee's work schedule have to fit within the guidelines, outlined by the regulations and the Department's letters, but also the employer has to provide a home-like environment and the parties must mutually agree to exclude sleep time from compensation. As we discussed above, Region V did not provide a home-like environment for its employees and it did not mutually agree with its employees to exclude sleep time.

Region V argues that it complied with the regulations after it changed the weekday LSTs' schedule on October 1, 1988. After the change, the weekday LSTs worked eight hour shifts during five consecutive twenty-four hour periods. This change allowed the LSTs to qualify for the exception under 785.23. However, Region V still did not comply with FLSA even after the schedule change because Region V did not provide the LSTs with a home-like environment containing private quarters, the parties did not mutually agree to exclude sleep time, and the LSTs could not obtain a reasonable night's sleep. The district court found that Region V did not qualify for the section 785.23 exception because the LSTs were on Region V's premises for Region V's benefit at all times. The court found that section 785.23:

> speaks of sleep time as one of the "periods of complete freedom from all duties." The LST's did not have complete freedom from their duties while they slept. They were required by Region V to remain on the premises to care for and protect the clients after clocking out at night.

Mem.Op. at 7. The court also concluded that section 785.23 had to be read in conjunction with 29 C.F.R. Section 785.14 (1987),

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[13](...continued)
required to be on duty and the time is work time.

29 C.F.R. Section 785.21(1987) (citations omitted).

defining whether waiting time is time worked under FLSA.[14] The court found that a reasonable person would have looked to section 785.14 to decide whether the LSTs sleep time should be compensated. The court found that because the LSTs were engaged to wait within the meaning of section 785.14 and Region V knew or should have known about the sleep interruptions, Region V was precluded from using the good faith defense. Mem.Op. at 13-14. The majority argues that the district court's reliance on section 785.14 was misplaced because none of the Department's letters referred to section 785.14. However, the Department's May 1985 pamphlet discussed waiting time and stated that waiting time could be included in hours worked depending on the circumstances. Jt. App. at 79. The pamphlet further stated that an employee required to be on duty for less than twenty-four hours is working even though he or she is allowed to sleep or engage in other personal activities when not busy. Id. at 81. "The employee is engaged to wait during slack time that may occur during the duty period." Id. The pamphlet stated that an employee who resides on the premises for an extended

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[14]Section 785.14 provides:

> Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." Such questions "must be determined in accordance with common sense and the general concept of work or employment."

29 C.F.R. Section 784.14 (1987) (citations omitted).

period of time:

> is not considered to be working all of the time while on the employer;s premises. Ordinarily an employee who resides on the employer's premises may engage in private pursuits; has enough time for eating, sleeping, and entertaining; and has other periods of complete freedom from duties when he or she may leave the premises for personal reasons. It is, of course, difficult to determine the exact hours of work under these circumstances. Therefore, any reasonable agreement by the parties which takes into consideration all of the pertinent facts will be accepted.

Id.at 82. Even while sleeping, Region V's employees did not have complete freedom from their duties because they were required to be on the premises and available in case the clients needed them. The LSTs were engaged to wait during the night.[15] The district court's finding that Region V should look to section 785.14 is not clearly

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[15] The pamphlet stated that employees"on call" who were not required to remain on the employer's premises and who were free to engage in personal pursuits were not working while on call. However,

> {w}hen an employee is called out on a job assignment, only the time actually spent in making the call need be counted as hours worked. Of course, if calls are so frequent or the readiness conditions are so restrictive that the employee is not really free to use the intervening periods effectively for his or her own benefit, the employee may be considered as "engaged to wait" rather than "waiting to be engaged."

Jt.App. at 80.

erroneous under these circumstances.[16]

B. Weekend LSTs

Weekend LSTs qualify for the twenty-four hour duty exception under section 785.22[17]. According to the regulations, these employees should be considered relief employees, not full-time employees. The majority makes its own factual findings regarding the weekend LSTs' ability to get at least five hours of sleep. although these employees fall within section 785.22, sleep time can only be deducted if the employee can get at least five hours of sleep during the scheduled period. The district court specifically found that the weekend LSTs rarely received five hours of sleep. Mem. Op. at 9. The majority, however, overlooks this finding and uses the time cards to find that the employees typically received at least five hours of sleep a night. The majority did not state that the district court's

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[16]The majority states that Region V could reasonably rely on the Department's February 3, 1981, letter discussing the sleep time issue as it applied to house parents in a group home. The majority argues that the house parents' schedule in that letter was similar to the weekday LSTs' schedule in this case. The schedule referred to in the letter indicated that employees on duty from 9:00 a.m. Monday to 5:00 p.m. Friday are considered to reside on the premises for extended periods of time within Section 785.23 because they are on duty five consecutive days but did not work full days. The LSTs only worked two hours on Friday. This is far removed from conformity with the Department's letter. That letter also provided that the parties had to have a reasonable agreement regarding sleep time deductions and that the employer had to provide a home-like environment with private quarters for the employees.

[17] Weekend LSTs worked Friday from 3:30-10:00 p.m. (slept 10:00 p.m. to 6:00 a.m. Friday through Sunday), Saturday and Sunday 6:00 a.m. to 10:00 p.m., and Monday 6:00 to 8:00 a.m.

finding was clearly erroneous. The majority also does not address the fact that the district court found the LSTs were not allowed to document many of their sleep time interruptions. The majority distinguishes Hultgren on this point, arguing that Hultgren did not involve full-time employees. In this case, the only employees considered full-time by the regulations are the weekday LSTs. The weekend and substitute LSTs are considered relief employees. In any event, the letters also state that relief and full-time employees should be treated the same regarding sleep time deductions. See Appellant's App. at 27-28 (Aug. 20, 1985 letter). The majority attempts to distinguish Hultgren on the basis that the Hultgren district court found the employees averaged from zero to four hours of sleep a night. The majority finds that this was obviously inconsistent with the regulations. The district court in this case found that Region V's employees did not receive five hours of sleep a night. Thus, Region V's treatment of its employees also was obviously inconsistent with he regulations. In this regard the majority's analysis remains inexplicable.

C. Substitute LSTs

Substitute LSTs worked the same shift as the person they replaced. Thus, they should also be considered relief employees.

To show compliance with the Department's requirements, Region V asserted that its employees were on call from 6:00 a.m. until 2:00 p.m. Tr. at 667-70. The employees, however, were never called in nor did they have to provide a telephone number where they could be reached. Even if an "on-call" employee was needed to work for some reason, Region V would call a substitute instead of a full-time employee. Tr. 566-70. This was an obvious attempt to circumvent the regulations. These violations cannot be ignored when weighing the alleged good faith reliance on the agency letters upon which the majority opinion focuses.

CONCLUSION

Each directive relied on by Region V to support its good faith defense was conditioned upon (1) the employer and the employees agreeing in advance to exclude sleep time, and (2) the employer providing a home-like environment for the employees. Region V did not meet these conditions.

I respectfully submit that this court should be bound by the record and our own precedent. I therefore dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BONNIE BOUCHARD, et al.,	) CV88-L-21
	) CV89-L-386
Plaintiff,	)
	)
vs.	)
	)
THE REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES and REGION V MENTAL RETARDATION SERVICES,	) MEMORANDUM OF
	) DECISION
Defendants.	)

KEVIN HUSS, CHRIS AMUNDSON, and JERRY JUNKERS,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
THE REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES, in the official capacity, and REGION V. MENTAL RETARDATION SERVICES,	)
	)
Defendants.	)

This action is brought pursuant to the Fair Labor Standars Act, 29 U.S.C §§ 201, et. seq. (FLSA). By stipulation of the parties the cases of Bonnie Bouchard, et. al. and Kevin Huss, et. al. have been consolidated. The twenty plaintiffs in these actions are past and present employees of Region V Mental Retardation Services (Region V). They seek unpaid straight and overtime compensation for sleep time that occurred during the course of their employment at Region V in Fairbury, Nebraska. In addition they seek liquidated damages, costs and attorney's fees.

FACTS

Region V operates group homes for clients with mental retardation in a sixteen-county area in Nebraska. It is governed by a Board of Directors consisting of one county commissioner for each sixteen counties. The Region provides both vocational and residential services to its mentally retarded clients. All the plaintiffs are past or present Life Skills Trainers (LST's) assigned to work one of three different shifts.

WEEKDAY SHIFTS:

Weekday LST's began their shifts on Monday at 3:30 p.m. when they arrived at the residential facility and clocked in. The LST's clocked out at approximately 10:00 p.m. The LST's remained on the premises until 6:00 a.m. on Tuesday morning, when they again clocked in. They remained on the premises and clocked out at approximately 8:00 a.m. on Tuesday morning. After 8:00 a.m. the LST's left the residential facility and returned at 3:30 p.m. on Tuesday. This schedule continued until Friday morning at 8:00 a.m., at which point they left the residential facility and did not return until the following Monday.

For the above-mentioned time period from 10:00 p.m. until 6:00 a.m. the following morning, the LST's were required to remain

on the premises and were not allowed to leave the premises at any time. They were allowed to sleep but were required to be available to care for clients' needs during the sleep time at all times in the event of an emergency. In the event an LST was called to duty during sleep-time hours, he or she would be compensated for the time actually spent up with a client. This time was to be rounded to the nearest quarter hour, with time spent up of less than 5-8 minutes (testimony varied) uncompensable.

WEEKEND SHIFTS:

Weekend LST's began their shifts on Friday at 3:30 p.m. and remained clocked in until 10:00 that night. The LST's remained on the premises until 6:00 Saturday morning when they clocked in again. They remained clocked in until 10:00 Saturday evening. They remained on the premises until 6:00 a.m. Sunday at which time they clocked back in and remained on the clock until 10:00 Sunday night. They remained on the premises until Monday morning, when the clocked in from 6:00 a.m. to 8:00 a.m. They then left the residence until the following Friday. Weekend LST's were not allowed to leave the premises a night on the weekends. Again, as with weekday staff, they were allowed to sleep at night, and were paid for interruptions rounded to the nearest quarter hour.

SUBSTITUTE SHIFTS:

Substitute LST's were required to fill in for one of the above shifts when needed. Their schedule mirrors the above schedules. They too were required to remain on the premises, were allowed to sleep, and were paid for interruptions rounded to the nearest quarter hour.

Generally, the duties of the LST's involved the responsibilty for utilizing individual program plans to instruct mentally retarded

clients in social skills, toilet training, feeding, dressing, motor coordination, management of personal finances, cooking, shopping, telling time and other social skills necessary to independent living. Their duties also included preparation of meals, maintaining sanitary living conditions, administering medication, recording daily activities of clients, and providing input to superiors concerning physical and emotional needs and progress of clients.

During the time period from approximately 10:00 p.m. until 8:00 a.m. the LST's were required to remain on the premises. Some residences provided the LST with a staff bedroom; in other residences the LST slept on a cot or couch in the general living area.

David Merrill, the Executive Director of Region V, testified that Region V represents itself as providing 24-hour care and that Region V does receive a benefit from having the LST's on the premises during sleep-time hours. This is supported by the ample testimony of the LST's concerning the activity of the clients during sleep-time hours and the general inability of the LST's to gain a restful night's sleep. Testimony was received regarding interruptions incurred by plaintiffs working all three different shifts. To avoid cumulative and repetitive testimony the parties stipulated that the testimony of all plaintiffs who did testify shall be considered to accurately reflect the working conditions for all LST's who are plaintiffs herein and who were employed by Region V Fairbury for the time period from April 15, 1986, until the present. Bouchard, Filing 48, Huss, Filing 4.

Among the interruptions which LST's dealt with during sleep-time hurs were (1) a client who hit herself and the wall during the night, (2) a client who urinated and defecated on the floor of her bathroom, (3) clients who were incontinent and soiled their beds during the night for which an LST would clean up the client and

change the sheets, (4) clients who woke up during the night and wandered about the residence, (5) clients who needed assistance in using the toliet, including the removal of clothing, wiping and flushing, (6) a client who had tried to leave the residence in the past, (7) clients who woke up during the night, dressed themselves and thought it was time to go to work, (8) a client who liked to get out of bed and rearrange things, (9) clients who awoke and become afraid of the sound of wind, thunder, and sirens, (10) a client who spent some nights awake and yelling, (11) a client who had a tendency to steal from other clients at night and damage property, (12) a client who had on occasion had a bowel movement in bed and then smeared it on the wall, (13) clients who came into the room where the LST was sleeping to make sure the LST was still there, (14) clients who became physically agressive, (15) a client with diarrhea and a prolapsed bowel, which ment the LST had to check her after each restroom visit to make sure her bowels had not fallen outside her body, and (16) a client prone to epileptic seizures.

It is undisputed that the LST's could (and sometimes did) write down these nighttime interruptions and that they would be paid for the time they were up and attending to a client. Interruptins for which the LST was up less than 5-8 minutes was not compensted and no compensation was allowed except for time the LST was out of bed. Time spent listening, wondering, worrying or waiting in bed, however alertly , was not compensated.

LEGAL ANALYSIS

Since 1985 the provisions of the FLSA have been held applicable to state and local governments. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). After the Garcia decisions, Congress provided that state and local governments would be sebject to the wage and hour provisions of the FLSA beginning on April 15, 1986. See Pub. L. No. 99-150, 99th Congress.

At issue here is whether the plaintiffs' sleep time constitutes work time within the FLSA. The question of whether sleep time constitutes work time is a question of fact for the trial court. Skidmore v. Swift, 323 U.S. 123 (1944). "This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time and all of the surrounding circumstances." Skidmore, supra at 137.

It is well settled that sleep time constitutes work time under appropriate circumstances. Beaston v. Scotland School for Veterans Children, 693 F. Supp. 234 (M.D. Pa. 1988), aff'd 869 f.2d 587 (3rd cir. 1989).

Courts are assisted by interpretive bulletins issued by the Administrator of the Wage and Hour Division of the United States Department of Labor. Although these interpretive bulletins are not binding on the courts, they do offer guidance. Beaston, supra at 237. The policy concerning sleep time is in Interpretive Bulletin Part 785, in Title 29 of the Code of Federal Regulations (Ex. 102), as follows:

> Section 785.20-GENERAL
>
> Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.
>
> Section 785.21 LESS THAN 24-HOUR DUTY. An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working

even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime. (Citations omitted)

Section 785.22 DUTY OF 24 HOURS OR MORE

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (citations ommited)

(b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get a least 5 hours' sleep during the scheduled period the entire time is working time. (citation omitted)

Section 785.23-EMPLOYEES RESIDING ON EMPLOYER'S PREMISES OR WORKING AT HOME.

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (citations omitted)

Thus, sleep time is compensable unless an employee is on duty for 24 hours or more and a qualified agreement for nonpayment is reached (§§ 785.22), or where an employee resides on his employer's premises on a permanent basis or for an extended period of time (§§ 785.23).

WEEKDAY LST'S

I believe that neither the §§ 785.22 exception nor the §§ 785.23 exception applies to weekday LST's, and thus they are entitled to compensation for sleep time. Richard Packwood, Director of Fiscal Management for Region V until March 1988, testified that weekday LST's "definitely" did not work a series of 17-hour shifts, but rather were on duty for 24 hours or more, even though the LST's left the residence at approximately 8:00 a.m. and did not return until 3:30 p.m. Both Merrill and Packwood testified that during these hours the LST's were "on-call". Section 785.17

of the Interpretive Bulletin defines on-call time as follows:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home with company officials where he may be reached is not working while on call. (citations omitted)

Plaintiff Ila Fett testified that she was not required to leave a number where she could be reached after clocking out at 8:00 a.m. She was not required to carry a beeper. Plaintiff Vickie Dannewitz tessified that she was never told that she was on-call during that time and in fact was never called in. She stated that the policy of Region V was to call in a substitute LST if a client became ill or for some reason an LST was needed to care for a client during daytime hours. Plaintiff Gary Sexton testified that he never understood he was to be on-call during the day and that he took college classes outside of Fairbury when he was not working. Kevin Huss was aware that he was considered to be on-call after 8:00 a.m. but that he was not required to carry a beeper, was never called in, that he considered himself free until 4:00 p.m., and that if a client became ill during the day a substitute LST was called in. David Merrill testified that LST's were not required to leave a phone number where they could be reached and that they were not required to carry beepers, but that he wanted LST's to be available for meetings. He did not recall if he ever told LST's that they would not be called in after 8:00 a.m. and before 3:00 p.m., but that he may have told them that Region V would try not to call them in and instead would first try to find a substitute. It is clear from the testimony that the LST's were not on-call during their hours away

from the residence, but were instead off-duty. Therefore, the LST's do not fall within the excetion contained in §§785.22.

The defendant contends that the LST's fall within the second exception contained in §§ 785.23, that being that sleep time need not be compensated when an employee resides on an employer's premises for an extended period of time. I disagree. Section 785.23 is not applicable to the working conditions of the LST's. Section 785.23 contemplates a situation where an employee would at times be on his or her employer's premises for his or her own benefit. It is clear from the testimony that the LST's were at all times on the group home premises for Region V's benefit, including the period of their sleep time. Section 785.23 speaks of sleep time as one of the "periods of complete freedom from all duties". The LST's did not have complete freedom from their duties while they slept. They were required by Region V to remain on the premises to care for and protect the clients after clocking out at night.

More importantly, the provisions of §§ 785.23 must be read in conjunction with §§ 785.14, which states:

> Whether waiting time is time worked under the act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." (Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense

> and the general concept of work or employment." (Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (C.A. 8, 1948))

The following cases demonstrate that the LST's were engaged to be waiting and are entitled to compensation for sleep time.

In Armour & Co. v. Wantock, 323 U.S. 126 (1944) the Court addressed the issue of whether firefighters who were required to remain on the company's premises from 5:00 p.m. when they clocked out until 8:00 a.m. the next morning were entitled to compensation for that time. During their nighttime duty the firefighters were required to remain on the premises, respond to any alarms, make temorary repairs of fire apparatus and take care of any defective sprinkler systems. These tasks consumed on the average less than one-half hour per week. Armour did not deny that the time actually spent working in the nighttime hours should be compensated In affirming the 7th Circuit's finding that such nighttime hours should be compensated, the Court held:

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to safety of the employer's property may be treated by parties as a benefit to the employer. Whether time is spent predomnantly for the employer's benefit or for the employee's is a question dependant upon all the circumstances of the case. 323 U.S. at 133.

In the companion case of Skidmore v. Swift & Co., 323 U.S. 134 (1944) the question of to whose benefit nighttime hours were spent was again raised. The answer depends on whether the employee was "engaged to wait" or "waiting to be engaged". Skidmore, supra

at 137.

> In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." "Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer..." Skidmore, supra at 138.

Four years later the 8th Circuit applied the principles of Armour and Skidmore in Central Missouri Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948). The plaintiffs, two nighttime telephone operators, brought an action to recover compensation for overtime hours worked during their eleven-hours-a-day, six-days-a-week shift, which started at 9:00 p.m. and ended at 8:00 o'clock the next morning. The plaintiffs were paid only for eight hours of work because they were allowed to rest or sleep during times when the switchboard did not need attending. The evidence showed that on some nights the plaintiffs received several hours sleep while on other nights they received very little sleep due to frequent interruptions. The court held that the entire eleven-hour shift must be compensated, because it was clear that they were required to be on the premises ready to serve and "were not there for the purpose of sleep nor for any purpose of their own, but for their employer's benefit." Central Missouri Tel. Co., supra at 646.

The court distinguished a previous case by the 8th Circuit in which sleep time was held not compensable and upon which Region V relies in the present case. In Rokey v. Day & Zimmerman, 157 F.2d 734 (8th Cir. 1946) the plaintiffs were employed as firemen who were required to be on duty for 24 hours

a day on alternate days. They were paid for sixteen of those hours, with the remaining eight hours uncompensated a sleep time. This arrangement was upheld on the basis that interruptions were rare and the plaintiffs slept an average of eight or nine hours a night. The Central Missouri court held that Rokey was readily distinguishable in its facts for the reason that the firemen were rarely interrupted.

A more recent case that has explained the waiting to be engaged doctrine is Halferty v. Pulse Drug Co., Inc., 821 F.2d 261 (5th Cir. 1987), modified 864 f.2d 1185 (5th Cir. 1989).

> [W]hen idle time is spent predominantly for the benefit of the employer, not the employee, the employee is engaged to be waiting, not waiting to be engaged and is entitled to compensation. Conversely, if the time primarily benefits the employee, the employee can be considered to be waiting to be engaged, and should receive compensation for actual work time. Halferty, sura at 269.

The LST's employed by Region V were staying at the residences during the nighttime hours for the benefit of Region V, not for their own benefit. The testimony of David Merrill acknowledges that LST's were responsible for the clients' safety and well-being and were in fact responsible for the clients' lives. He believes that it is the responsibility of an LST to respond to a client during the nighttime hours if the LST has reason to believe a client could cause harm to himself or others, or could cause damage to property. The testimony of the LST's shows that they believe themselves to function in a parent-like role and that they remained responsible for the clients' safety at any time they were on duty, including those hours during which they were allowed to sleep.

WEEKEND LST'S

I find that weekend LST's did work for 24 hours or more. At issue is whether weekend LST's fall within the 785.22 exception, which states that "where an employee is required to be on duty for 24 hours or more, the employer and employee may agree to exclude ... a bona fide regularly scheduled sleeping period... provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep." (Emphasis supplied)

The greater weight of testimony showed that LST's were rarely, if ever, able to enjoy an uninterrupted night's sleep. In fact, few LST's ever had a night where they received at least five hours of uninterrupted sleep. The demands of their job simply did not allow for such luxury.

SUBSTITUTE LST'S

As mentioned previously, substitute LST's filled in for both weekday and weekend staff on an as-need basis. In analyzing the question of sleep-time compensation for substitute LST's it is necessary only to determine whether they were filling in for a weekday person or a weekend person. If they were filling in for a weekday person the analysis previously discussed for weekday LST's should be equally applied to their substitutes. If they were filling in for weekend LST's then the analysis previously discussed for weekend LST's should be applied.

GOOD FAITH DEFENSE

Region V asserts that even if I find that it violated the provisions of the FLSA, it is entitled to a good faith defense under the Portal to Portal Act, 29 U.S.C. §§ 259 (PTPA). The act states in pertinent part as follows:

> (a) In any action or proceeding based on any act or omissions on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the [FLSA] ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.
>
> (b) The agency referred to in subsection (a) of this section shall be -- (1) in the case of the Fair Labor Standards of 1938, as amended...the Administrator of the Wage and Hour Division of the Department of Labor.

Good faith is determined by using an objective test for which the evidence must show that the defendant's acts were consistent with those of a reasonably prudent person under similar circumstances. Good faith requires that the employer have honesty of intention and no knowledge of circumstances that ought to put him or her on inquiry. 29 C.F.R. §§ 790.15(a). Region V relied on several documents received from the National Association of Private Residential Facilities for the Mentally Retarded (NAPRFMR) who

had in turn received these documents from a deputy administrator (Ex. 104) and as assistant administrator (Ex. 105) in the Wage and Hour Division. In Hultgren et. al. v. County of Lancaster, No. CV88-L-93 (D. Neb., May 10, 1989) the defendant asserted a good-faith defense under 29 U.S.C. 259. The defendant, in part, based its defense on two opinion letters from the deputy administrator of the Wage and Hour Division. The court concluded that the opinion letters were insufficient to support a finding that the defendant acted in good faith because the documents were not issued by the Administrator of the Wage and Hour Division as required in §§ 259(b). The opinion letters came from lesser officials or employees and were therefore insufficient to support the good-faith defense of §§ 259. See also, National Automatic Laundry and Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971).

While I realize that §§ 29 U.S.C. 259(a) states that one is entitled to rely on a written administrative regulaiton, order, etc., of the agency specified (that agency being the Administrator of the Wage and Hour Division), this is not broad enough to cover lesser officials within the agency, including deputy and assistant administrators. I base this conclusion on the fact that "agency" is defined in 29 C.F.R. 790.19 as being expressly limited to the official or officials actually vested with final authority under the statutes involved. It goes on to explain that the definition of "agency" in other federal statutes indicates that the term has customarily been restricted in its usage by Congress "to the persons vested under the statutes with the real power to act for the Government--those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment*". (* footnote omitted)

For this reason I will not consider any documents which Region V received from anyone other than the Administrator in determining whether a good faith defense applies.

Three documents, authored by the Administrator of the Wage and Hour Division, were received by Region V. It appears that these documents were not received by Region V directly from the Administrator but rather through NAPRFMR. The first document is a memorandum dated December 2, 1987, upon which both Merrill and Packwood relied. (Ex 108) It said that time spent sleeping by employees of group homes who failed to meet the definition of full-time or relief employees, as discussed in FOH 31d01, could not be excluded in computing compensable hours of work. In order to exclude sleep time for such employees they must be on duty for 24 hours or more, as discussed in 785.22. No evidence has been furnished to guide me in determining the definition contained in FOH 31d01 but I find nothing in the memorandum of December 2, 1987, that would give Region V an objectively valid reason for believing in good faith that the LST's should not be compensated for their sleep time.

In the second memorandum (Ex. 109) dated January 4, 1988, the Administrator stated that the National Office would be reviewing group home compliance involving issues of hours worked and would in the near future provide specific guidance on how hours worked should be treated in investigations of group homes. All investigations of group homes involving issues of work hours then in progress were suspended. Nothing in this memorandum gives Region V an objective reason for believing in good faith that the LST's were not entitled to compensation for their sleep time.

Finally, David Merrill received a memorandum authored by the Administrator dated June 30, 1988. (Ex. 160) Merrill reviewed this document and sent a copy to his legal counsel requesting an opinion. The document states that the review of group home investigations had been completed and it was determined that further guidance on hours worked issues was necessary. An enforcement policy is attached to the memorandum for guidance as to the

conditions under which the Wage and Hour Division, in its enforcement of FLSA, will not require compensation for sleep time. It starts out by reviewing its previous position on the definition of "residing on the premises permanently" or for "extended periods of time" and says that in 1981 it took the position that residing on the employer's premises for 120 hours a week or 5 consecutive days or nights would qualify an employee as residing on the premises for an extended period of time. It goes on to say that it is refining and restating the minimum conditions required to be deemed as residing on the premises for an extended period of time. The new conditions were that: (1) the employee be on duty at the group home and be compensated for at least eight hours in each of five consecutive 24-hour periods; and (2) the employee must sleep on the premises for all sleep periods between the beginning and end of the 24-hour period. The following example is given:

> Any 24-hour period can be utilized, and the eight compensated hours per 24-hour period need not be consecutive. Thus, an employee who is on duty and compensated for the period 5:00 p.m. to 10:00 p.m. Monday, 6:00 a.m. to 9:00 a.m. and 3:00 p.m. to 10:00 p.m. Tuesday through Friday, and 6:00 a.m.to 9:00 a.m. Saturday, and who sleeps on the premises (10:00 p.m. to 6:00 a.m.) for all sleep periods from Monday night through Friday night, has been compensated for at least eight hours in five consecutive 24-hours periods between 5:00 p.m. Monday and 5:00 p.m. Saturday. The employee would also have slept five consecutive nights on the premises. Provided the other conditions were met, this would be considered to be residing on the premises for an extended period of time.

Weekday LST's did not meet this criteria because they did

not work eight hours in five consecutive 24-hour periods. David Merrill testified that after receiving this document Region V made a schedule change in October 1988, so that weekday LTS's worked eight-hour shifts during five different 24-hour periods. The issue is whether this is sufficient to support a finding that Region V had an objective reason for good faith reliance in believing, at least at this point when they changed their schedule, that they were in compliance with wage and hour laws and that they did not need to compensate for sleep time.

Section 785.23 must be read in light of §§ 785.14. The memorandum did not address a situation where an employee is engaged to be waiting during the time the employee is allowed to sleep. Under a reasonable person (objective) standard, Region V had to read the memorandum in light of the conditions and requirements of the entire Interpretive Bulletin as they knew them or should have known them. I believe a reasonable person should have read the memorandum in light of the waiting to be engaged doctrine embodied in §§ 785.14. Section 785.14 is contained in the same Interpretive Bulletin that contains §§ 785.22 and §§ 785.23. This Bulletin was received by Region V on or about February 27, 1985, so there is no question but that Region V had the provisions of §§ 785.14 within its possession.

The next question to be answered is whether a reasonable person in the position of Region V would know or should have known that the LST's were performing services for Region V during sleep-time hours; that is, that the LST's were on the premises for Region V's benefit. David Merrill testified that he relied on the LST's time cards to determine how many interruptions occurred during sleep time. Kal Lausterer, area director of Region V in Fairbury also believed that interruptions incurred by LST's were written down on time sheets. The general consensus of testimony by the LST's was that they sometimes, but not consistently,

documented sleep-time interruptions on their time sheets. However, this was due in large part to the fact that the LST's were not allowed to document any interruptions which did not last at least 5-7 minutes and could not document interruptions for which they did not have to physically be out of bed. Both Merrill and Klausterer knew that the these were the policies of Region V.

In addition, Region V was informed by various LST's that they had problems with nighttime interruptions. Ila Fett voiced concerns to Lausterer about her problems sleeping. She also told Clarice Wienke, residential coordinator for Region V in Fairbury, about her sleep-time problems. Wienke's response was that it was sad, but nothing could be done. Vickie Dannewitz testified that Lausterer and Wienke were aware that she regularly got out of bed at 5:00 a.m. to take two of her clients to the restroom, and that she had discussed sleep time problems with Wienke. Gary Sexton stated that his supervisors were aware that he got up every 1 1/2 hours to take a client to the bathroom and that he was instructed to do this when he started his job. Between July 1986 and August 1987 Patrick Bouchard had conversations with Lausterer regarding payment for sleep time. Bouchard described this as a "constant topic". Dan Rosey testified that he complained to Lausterer and Wienke more than once about nighttime interruptions.

I find from the evidence as a whole that Region V knew or shoud have known that the LST's sleep-time interruptions did occur, and that they were a normal part of the job. This, combined with the fact that Region V knew about or should have been aware of §§ 785.14, eliminates any good faith defense. I cannot find that their acts were consistent with those of a reasonably prudent person, nor can I find that they had no knowledge of circumstance that ought to have put them on inquiry.

The memorandum goes on to explain that where one or

more employees meet the full-time employee/residing on the premises test described above, Wage and Hour will likewise apply the provisions of 785.23 to one or more "relief" employees who reside on the premises for one to three nights. It is clear that they are referring to employees who temporarily take the place of a full-time employee, such as a substitute LST filling in for a weekday LST not a weekend LST. Nothing is this memorandum gives Region V an objective reason for believing in good faith that weekend LST's were not entitled to compensation for their sleep time.

LIQUIDATED DAMAGES

Plaintiffs seek, in addition to unpaid compensation, an additional equal amount as liquidated damages pursuant to 29 U.S.C. 216 (b) which directs than an employer who violates the minimum wage or overtime provisions "shall be liable ... in the amount of ... their unpaid overtime compensation, and in an additional equal amount as liquidated damages." However, 29 U.S.C. 260 permits an employer to assert a good faith defense to payment if the employer can show "that the act or omission giving rise to [the] action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]."

Whether the good faith defense applies depends on a two-part test. In order to invoke the defense the employer has the burden of showing that he acted in good faith and that he had reasonable grounds for believing that he did not violate the FLSA. Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726 (10th Cir. 1984). this is in contrast to the objective good faith test used in §§ 259. Here, the test for awarding liquidated damages incorporates both a subjective and an objective standard. In order to satisfy the subjective good faith component under §§ 260 the

employer is obligated to prove that he had an honest intention to ascertain the requirements of the FLSA and to act in accordance with it. E.E.O.C. v. First Citizens Bank of Billings, 758 F.2d 397, cert. denied, 474 U.S. 902 (1985).

Acts or omissions occurring on advice of counsel or other professionals warrant a finding, under a subjective test, that an employer acted in good faith and, objectively, will support a finding that the employer had reasonable grounds upon which he could base a belief that he was acting in accordance with FLSA requirements. Hultgren et. al. v. County of Lancaster, supra. In Lane v. M's Pub, Inc., 435 F. Supp. 917 (D. Neb. 1977) the court denied the plaintiff's request for liquidated damages primarily on the basis that his employer had consulted with her accountant who had informed her (wrongly) that the provisions of the FLSA were inapplicable in her business. The court found that even though the accountant was mistaken the employer had reasonably and in good faith relied on his advice, and declined to award liquidated damages.

Similarly, the evidence in this case shows that Region V had reasonable grounds for believing they were not in violation of FLSA provisions. Region V sought out information both from NAPRFMR and from counsel. For that reason liquidated damages are not appropriate in this case.

Counsel have stipulated to the amounts of straight and overtime compensation the plaintiffs are entitled to if the plaintiffs are found to prevail. Judgment will be entered in those amounts, as follows:

Tammy Empfield	$	2,432.43
Larry Yates		5,460.61
Ila Fett		32,394.00
Debra Junker		30,024.96

Dan Rosey	9,872.83
Rodney Wacker	7,292.91
Kevin Huss	25,682.11
Phyllis Hensley	14,754.26
Leo Prokop	17,059.10
Jean Peters	26,076.27
Vickie Dannewitz	23,641.61
Gary Sexton	18,074.51
Bonnie Bouchard	9,033.14
Jerry Junker	11,114.36
Kevin Carlson	15,608.94
Jack Yates	2,772.33
Chris Amundson	7,134.27
Rose Marie Steel	6,283.30
Doris Meyer	6,777.21
Pat Bouchard	10,926.40

Under 29 U.S.C. §216 the plaintiffs are entitled to a reasonable attorney's fee. Judgment will be withheld until the amount of fees to be allowed is resolved. Counsel are invited to proceed in accordance with Local Rule 34 and the Fee Application Guidelines referred to in that rule.

IT IS ORDERED that plaintiffs' counsel shall have until February 2, 1990, to submit a showing regarding attorney's fees and the defendants may respond by February 16, 1990.

Dated January 22, 1990.

BY THE COURT

Warren K. Urbom
United States District Judge